IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 19 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : YES

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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ARUN KUNDUVALLAPIL KRUSHNA NAYAR

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 19 of 2001
MR MM TIRMIZI for Petitioner No. 1
Mr. H.L. Jani, AGP for Respondent No. 1-3

CORAM : MR.JUSTICE H.K.RATHOD

Date of decision: 03/07/2001

ORAL JUDGEMENT

Heard learned advocate Mr. Tirmizi, for the petitioner and Mr. Jani, learned AGP for the respondent State. In this petition, the petitioner has challenged the impugned order of detention dated 25.11.2000 passed by the detaining authority under section 3(1) of the

Gujarat Prevention of Anti Social Activities Act, 1985 ("the PASA Act" for short). The grounds of detention have been communicated to the petitioner under section 9(1) of the PASA Act and the petitioner has initially been detained at Jamnagar Jail as Class II Detenu. According to the record, initially, the detaining authority passed the order of detention on 20th October, 2000 against the petitioner but that order has subsequently been revoked by the detaining authority on technical ground that the petitioner who is Madrasi is not aware of the Gujarati language and, therefore, the documents were thereafter translated in Hindi and without releasing the petitioner from earlier detention, second order of detention dated 25th November, 2000 has been passed against the petitioner which is under challenge in this petition. As per the grounds of detention, one offence has been registered against the petitioner under section 398, 399, 400 of the Indian Penal Code and section 135(1) of the Bombay Police Act and section 25(1)(A) of the Arms Act. The petitioner, at the time of passing of the impugned order of detention, was in police custody by way of remand. Statements of the secret witnesses recorded by the concerned PI on 16th October, 2000 were verified by the detaining authority on 19th October, 2000. In this petition, the State Government has filed the affidavit in reply but no reply has been filed by the detaining authority.

Learned advocate Mr. Tirmizi appearing for the petitioner has raised various contentions but according to him, two contentions are enough for setting aside the impugned order of detention. The first contention raised by Mr. Tirmizi is to the effect that the petitioner was in police custody by way of remand at the time when the impugned order was passed and there was no bail application filed by the petitioner before any competent court. Therefore, without any cogent material on record, the impugned order of detention has been passed against the detenu. Said contention has been raised in Ground (i) page - 7 of the memo of petition. The second contention raised by Mr. Tirmizi is to the effect that looking to the date of offence registered against the petitioner which is 12th October, 2000 and the impugned order of detention has been passed by the detaining authority on 25th November, 2000 and, therefore, there was delay in passing the impugned order of detention and this delay in passing the order of detention has vitiated the detention. According to him, such delay has not been explained by the detaining authority by filing necessary affidavit on record. In support of this contention, he has placed reliance on the decision of

this court reported in 1997 (1) GLH 381. He has also relied upon two other decisions of the apex court reported in 1985 (4) SCC 232 and 2000(1) SCC 341.

Learned AGP Mr. Jani has submitted that initially, the petitioner was detained as per the order of detention dated 20.10.2000 wherein the grounds were communicated and supplied to the petitioner in Gujarati language and the petitioner being Madrasi, he was not aware of Gujarati language and, therefore, documents were required to be translated and, therefore, said order was revoked and subsequent order dated 25.11.2000 was passed for detaining the petitioner while revoking the earlier order on the said technical ground and, therefore, for the aforesaid reason, there was delay. Learned AGP Mr. Jani has supported the impugned order of detention and has submitted that there is no bar in passing the order of detention of a person while in police custody. He has also submitted that the detailed affidavit in reply has been filed by the State Government explaining the situation and, therefore, according to Mr. Jani, the impugned order of detention has rightly been passed by the detaining authority and, therefore, this Court should not interfere with the same and therefore, this petition is required to be dismissed.

I have considered the arguments of the learned advocates for the respective parties. I have considered the two contentions raised by the learned advocate Mr. Tirmizi, that at the time of passing of the order of detention, the petitioner was in police custody. I have also considered the contention of Mr. Tirmizi regarding delay in passing the impugned order of detention from the date of the offence registered against him. Taking into account the fact that earlier, order of detention was passed on 20th October, 2000 which has subsequently been revoked by the detaining authority on technical ground and while remaining in jail in respect of the earlier order, second order of detention has been passed against the petitioner and has been communicated to the petitioner on 25th November, 2000. Therefore, the petitioner has raised contention on page 11 ground (p) of the memo of petition and considering the delay in passing the order of detention and considering the revocation of the earlier order of detention and considering the fact that the earlier order was quashed and the second order of detention was passed and, therefore, this order is required tobe quashed and set aside. Mr. Tirmizi has also submitted that at the time of passing the impugned order of detention, the petitioner was in police custody

on remand and, therefore, there was no necessity to detain the petitioner without any cogent material on record. In view of this contention, the view taken by the apex court in 1985(4) SCC 232 and 2000(1) SCC 341 is material.

In case of Ramesh Yadav v. District Magistrate and another (supra), the apex court has observed as under:

"6. On a reading of the grounds, particularly the paragraph which we have extracted above, it is clear that the order of detention was passed as the detaining authority was apprehensive that in case the detenu was released on bail, he would again carry on his criminal activities in the area. If the apprehension of the detaining authority was true, the bail application had to be opposed and in case bail was granted, challenge against that order in the higher forum had to be raised. Merely on the ground that an accused in detention as an under trial prisoner was likely to get bail an order of detention under the National Security Act would not ordinarily be passed. We are inclined to agree with counsel for the petitioner that the order of detention in the circumstances is not sustainable and is contrary to the well settled principles indicated by this Court in a series of cases relating to preventive detention. The impugned order has therefore, to be quashed."

In light of the said decision, considering the facts of this case, there is no observations made by the detaining authority in the grounds of detention that any bail application has been filed by the petitioner in respect of the offence registered against him. There is no averment to that effect and there was no material with the detaining authority to have the reasonable apprehension of the petitioner's release on bail after completion of the period of remand and to indulge in the same activities again after release on bail.

In case of Amratlal and others versus Union of India reported in (2001) 1 SCC 341, the apex court has observed that while passing the order of detention, subjective satisfaction of the detaining authority is required to be established from the record. If the detenu is already in jail, then, the detaining authority

must be satisfied on the basis of the available cogent material about likelihood of the detenu being released on bail and not merely about likelihood of his moving an application for bail. In absence of such subjective satisfaction, order of detention cannot sustain. Therefore, in view of the observations made by the apex court and looking to the facts and circumstances of the case, there is no observation made by the detaining authority in the grounds of detention that there was application filed by the petitioner for his being released on bail in respect of the offences registered against the petitioner. It has been held as under:

"As held in Binod SIngh case (1986 4 SCC 416, if a person is in custody and there is no imminent possibility of his being released therefrom, the power of detention should not ordinarily be exercised. There must be cogent material before the officer passing the detention order that the detenu is likely to be released on bail. The inference must be drawn from the available material on record and must not be ipse dixit of the officer passing the order of detention. In the present case, the requirement that there was likelihood of the detenus being released on bail was, however, not available in the reasoning as provided by the officer concerned. The reasoning available is the "likelihood of his moving an application for bail" which is different from "likelihood to be released on bail". This reasoning is not sufficient compliance with the requirements as laid down The available cogent material in this case was the likelihood of having a bail application moved in the matter but not obtaining a bail order. Therefore, the detention order is liable to be quashed. "

There was no material before the detaining authority to have some reasonable apprehension about the petitioner to be released on bail. Therefore, considering these facts of the case, according to my opinion, the detaining authority has not applied mind properly. It amounts to non application of mind. In view of such non application of mind on the part of the detaining authority, subjective satisfaction is not established, looking to the facts of the present case.

However, learned advocate Mr. Jani has relied upon the decision of the division bench of this court reported in 1988 (2) GLH 475 in case of Nasimbanu. Now,

this decision is in respect of lesser drastic remedy of cancellation of bail and the division bench of this court has held that the non consideration of this aspect of cancellation of bail as a lesser drastic remedy would not amount to non application of mind. Thus, the facts of the present case are different. Therefore, this decision is not helpful to the State. However, Mr. Jani has also relied upon the decision of the full bench of this court in special civil application no. 9579 of 2000 dated 4.5.2001. In para 41, Full Bench of this Court has considered the decision of the apex court in case of Amratlal and another versus Union Government (supra). The observations made by the full bench are that this decision shows that the detention order can be passed even though the detenu is in judicial custody if there is cogent material to indicate that he is likely to be released on bail. There is no dispute on this legal proposition that while the detenu is in judicial custody, order of detention can be passed but one aspect is also required to be kept in mind that there must be some cogent evidence to indicate that the detenu is likely to be released on bail and in absence of such material, subjective satisfaction cannot be said to have been established. In the instant case, such subjective satisfaction has not been established. Therefore, this decision of the full bench and also the decision of the division bench in 1988 (2) GLH 475 are not helpful to the respondent State in the facts and circumstances of the present case.

I have also considered the decision reported in 2000(3) GLR page 2696. Relevant observations are as under:

"After referring to Kalidas C. Kahar v. State of Gujarat, 1993 (2) GLR 1659, the Court observed:

The statements of the three witnesses in the instant case which were recorded before the [police inspector on 17th August, 1999, 21st August, 1999 and 25th August, 1999 with regard to the incidents dated 10th July, 1999, 13th June, 1999 and 26th June, 1999 were the material along with the proposal which is said to have been made on 27th August, 1999 and it is clear from the record that it was on 29th August 1999 that the detaining authority has recorded its verification of all these three statements. There is nothing on record to show that the detaining authority

had considered the proposal dated 27th August, 1999 at any time prior to 29th August, 1999 and on 29th August 1999, all that has been done is that the concerned witnesses have stated before the detaining authority that the statements as had been made on the respective dates were correct and immediately thereafter on the following day, i.e., on 30th August, 1999 the detention order has been passed. (Para. 9).

The manner in which the verification has been recorded of the made by these three witnesses for the purpose of section 9(2) shows that the same has been done only as an empty formality in as much as the same witnesses had been called before the detaining authority and the detaining authority had recorded that whatever statements made by the witnesses were correct. Thus, the whole exercise appears to have been done as a mechanical exercise and it is not borne out that there is an active application of mind on this aspect of the matter by the detaining authority for the purpose of verification of the facts as had been disclosed by the witnesses so as to express the fear and to invoke the privilege under Section 9 (2) against the disclosure of the names and addresses of the witnesses and it thus appears on the basis of the ratio of the decision of the Division Bench that it is a case of wrong exericse of power u/S. 9(2) and it is established that in such case the wrong exercise of power u/S. 9(2) adversely affects detenu's right of making an effective representation guaranteed under Article 22(5) of the Constitution of India. (Para. 9).

Once the materials are placed before the detaining authority with the proposal by the sponsoring authority it must have reasonably sufficient time for the purpose of verification of the facts and the consideration of the entire material with an active application of mind and the order has to be passed at the earliest opportunity, but in this process to strike the balance between the public interest and the right of the detenu either of the two should not be defeated in any manner and the whole process must indicate that the detaining authority had applied its mind with the requisite approach and it had also devoted sufficient time before arriving at the decision to claim the privilege u/S. 9(2) of

the PASA Act and also to come to the conclusion that the detenu was required to be detained immediately. In the facts of the case, I find that this requirement of maintaining the balance has been defeated and the detention order has been passed on 30th August, 1999 i.e. on the next day to the date on which the materials were considered by the detaining authority."

As regards delay in passing the impugned order of detention from the date of the last offence registered against the petitioner, learned advocate Mr. Tirmizi has relied on the decision of this Court in case of Elesh Nandubhai Patel versus Commissioner of Police reported in 1997 (1) GLH 381. Para 21 of the said decision reads as under:

"In the instant case, the last registered case is of May 20, 1996. The petitioner detenu was granted anticipatory bail by the competent Court. He was also granted regular bail subsequently. The impugned order of detention has been passed on November 5, 1996 i.e. after a delay of five months and fifteen days. It is of course true that the detaining authority has relied on two incidents of 2nd October and 10th October, 1`996, both unregistered cases. I have gone through the allegations. I fail to understand if the allegations are really of such a grievous nature, why the cases have not been registered against the petitioner. There appears to be some substance in the contention of the petitioner that these two unregistered cases have been referred only with a view to cover up the gap or to give life to a stale case. This unexplained delay makes a ground of detention not proximate, vitiating the order of detention itself. If I am to buttress my findings, I would say the reference may be made to the decision of the Supreme Court in Anand Prakash v. State of U.P. reported in AIR 1990 SC 516 and Pradeep Nilkanth v. S. Ramamurthy reported in 1993 (2) Suppli. SCC 61."

In view of the observations made by this Court in the aforesaid decision and also considering the undisputed facts which are on record that more than one month has passed from the date of last registered offence and that delay has remained unexplained by the detaining authority, and also considering the fact that at the time

of passing the order of detention, the detenu was in police custody by way of remand, I am of the view that the order of detention is required to be quashed and set aside.

For the reasons recorded hereinabove, the petition succeeds and the same is allowed. The order of detention dated 25.11.2000 is vitiated and resulted to quash and set aside. The detenu Arun Kunduvallapil Krushna Nayar who has been detained at the District Jail, Jamnagar be set at liberty forthwith if he is not required in any other case. Rule is made absolute accordingly. No order as to costs. Direct Service is Permitted.

3.7.2001. (H.K. Rathod,J.)